March 5, 2004, which set the deadline to timely file a notice of appeal at April 5, 2004. The Petitioners did not file a notice of appeal until May 1, 2004. Thus, the appeal was not timely filed and was properly dismissed.

The Kentucky Rules of Civil Procedure do not permit successive post-judgment motions. *See Cloverleaf Dairy v. Michels*, 636 S.W.2d 894, 895-896 (Ky. App. 1982). Motions to reconsider the denial of a post judgment motion do not toll the time for a Kentucky litigant to take an appeal. *See Rodger v. Berry*, 346 S.W.2d 43 (Ky. 1961); *Taylor v. Warmon*, 331 S.W.2d 899 (Ky. 1960). Thus, the Petitioners' second Motion to Alter, Amend or Vacate was a nullity and did not toll the running of time to file the Notice of Appeal.

The Kentucky Court of Appeals relied on Petitioners' procedural error to dismiss the appeal (July 1, 2004 Order, attached as Appendix F to the Petition),[5] and the Kentucky Supreme Court denied review without explanation. As is

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[5] The Kentucky Court of Appeals also rejected the Petitioners' reliance on cases from other jurisdictions holding that the time for appeal is tolled when a second post-judgment motion raises issues not previously considered in the litigation which are based on newly discovered evidence. *See* August 23, 2004 Order Denying Motion to Reconsider, Petition, Appendix E. On the Motion, the Petitions asserted, as they continue to assert in the Petition, that the issues surrounding the lost record were first brought to the trial court's attention by their second post-judgment motion filed on March 18, 2004. However, as noted above, the trial Court granted the Respondent's Motion to Reestablish the Record by Order dated March 5, 2004, which also denied the Petitioners' first post-judgment motion. The Kentucky Court of Appeals noted that the authority from other jurisdictions was not persuasive and distinguished it by recognizing that the court had already ruled on the "new" lost record issue that the Petitioners claimed to have first presented to the trial court in the second motion. *See* August 23, 2004 Order Denying Motion to Reconsider, Petition, Appendix E.

evident from the authority cited above and the absence of contrary Kentucky authority, the rule of appellate procedure applied to dismiss the Petitioners' appeal is well-established and uniformly applied.

The Petition is almost exclusively devoted to authority from jurisdictions with procedural requirements which differ from the Kentucky procedure described above. Petitioners make no meaningful claim or elaborate on the contention that Kentucky's procedure for filing timely appeals falls below minimal constitutional requirements. Nor do the Petitioners claim that the foreign cases in their Petition describe procedural rules that are absolutely required of states by the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The Commonwealth of Kentucky has a legitimate interest in achieving orderly appellate practice and pursues that goal by enforcing the procedural rules governing the time in which appeals must be taken. The Petitioners did not follow those rules, and their appeal was properly dismissed. The dismissal of the appeal and denial of review by the Kentucky Supreme Court rests on those independent and adequate state procedural grounds. To the extent a federal question has been raised in the Petition, no such issue was preserved for review. Thus, the Petition must be denied.

CONCLUSION

Based on the foregoing, the Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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KY. REV. STAT. ANN. § 422.240 (Michie 1992)

(1) If the records or papers of any court are lost, destroyed, defaced, or obliterated, the court shall appoint a commissioner, who shall have power and authority to fix on a convenient place to meet for the purpose of hearing evidence in regard to the lost records or papers, giving reasonable public notice thereof.

(2) The commissioner shall be paid a reasonable compensation out of the county treasury and shall not remain in office longer than one (1) year.

(3) The commissioner may, at the instance of any person, issue a summons and cause the attendance of witnesses, and take evidence, in writing, of such witnesses, relative to any record or paper so destroyed, defaced, or obliterated. The deposition shall be legal evidence, and shall be returned to the clerk of the court and safely kept by such clerk. Before any proof is taken, the party offering it must make and file with the commissioner an affidavit that there is no attested copy of the record or papers in existence known to him. If the affidavit is not made, no testimony taken shall be evidence.

Kentucky Rule of Civil Procedure 73.02

(1) (a) The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).

(b) If an appeal or cross-appeal is from an order or judgment of the circuit court, the filing fee required by Rule 76.42(2)(a)(i) or (ii) shall be paid to the clerk of the circuit court at the time the notice of appeal or cross-appeal is

tendered, and the notice shall not be docketed or noted as filed until such payment is made. Motions to proceed in forma pauperis on such an appeal or cross-appeal must be addressed to the circuit court. If timely tendered and accompanied by a motion to proceed in forma pauperis supported by an affidavit, a notice of appeal or cross-appeal shall be considered timely but shall not be filed until the motion to proceed in forma pauperis is granted or, if denied, the filing fee is paid. If the motion to proceed in forma pauperis is denied, the party shall have ten days within which to pay the filing fee or to appeal the denial to the appropriate appellate court. Time for further steps in the appeal or cross-appeal shall run from the date that the notice of appeal is filed upon payment of the filing fee or the granting of the motion to proceed in forma pauperis.

(c) If an appeal or cross-appeal is from an order or judgment of the district court, the filing fee required by KRS 23A.210 or 23A.205(1) shall be paid to the clerk of the district court at the time the notice of appeal or cross-appeal is filed, and the notice shall not be docketed or noted as filed until such payment is made.

(d) Upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time.

(e) The running of the time for appeal is terminated by a timely motion pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this Rule commences to run upon entry and service under Rule 77.04(2) of an order granting or denying a motion under

Rules 50.02, 52.02 or 59, except when a new trial is granted under Rule 59.

(2) The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion, but is ground for such action as the appellate court deems appropriate, which may include:

(a) A dismissal of the appeal or denial of the motion for discretionary review,

(b) Striking of pleadings, briefs, record or portions thereof,

(c) Imposition of fines on counsel for failing to comply with these rules of not more than $500, and

(d) Such further remedies as are specified in any applicable Rule.

(3) When the right of appeal in special civil cases is granted by statute, such appeals shall be prosecuted as provided in KRS 446.190.

(4) If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

(3)

No. 05-211

FILED
SEP 30 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LINDA STETLER AND DENNY STETLER,
Petitioners,

versus

SRN ENTERPRISES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

REPLY OF THE PETITIONERS TO THE BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY OF THE PETITIONERS TO THE BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioners, in Reply to the Brief of the Respondent in Opposition to Petition for Writ of Certiorari, state as follows:

COUNTERSTATEMENT OF THE CASE

In its Brief, the Respondent correctly notes that the Petitioners did not own the property in question at the time of foreclosure. The Respondent, however, has failed to note that it was the Respondent, Plaintiff below, who impleaded Linda Stetler and Denny Stetler as parties Plaintiff, thus bringing them into the instant action.

The Respondent further notes, also correctly, that on March 18, 2004, the Petitioners filed a second Motion to Alter, Amend or Vacate the Judgment and Order of Sale entered by the Clinton Circuit Court. Respondent has, however, failed to note that the second Motion to Alter, Amend or Vacate contained new matter concerning issues which had arisen during the seven and one-half months between the date on which Petitioners filed their first Motion to Alter, Amend or Vacate on June 23, 2003, and the date on which the Clinton Circuit denied that Motion March 5, 2004.

The Respondent has also failed to note that, at the time the subject property was offered for sale, it was subject to an automatic stay by the United States Bankruptcy Court for the Western District of Kentucky, Bowling Green Division. That matter is currently pending before the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. THE PETITIONERS DID NOT LACK STANDING TO ASSERT THE CLAIMS PRESENTED HEREIN.

In its Brief, the Respondent states, correctly, that the Petitioners did not own the property in question on the date of the sale. Respondent then asserts, erroneously, that for this reason, "The Petitioners lack standing to seek review from this Court."

Respectfully, Petitioners insist that the Respondent is mistaken.

As an examination of the Complaint which SRN Enterprises, Inc., filed herein will show, it was the Respondent itself which brought the Petitioners into this action. While the Complaint is hardly a model of clarity, and it is not clear exactly why the Respondent impleaded the Petitioners as parties Defendant in the Court below, Petitioners apprehend that it was because they both were signatories on the mortgage whhich secures the note here sued on.

For that reason, it is manifest that, should the execution sale sought by SRN have failed to produce sufficient funds to satisfy the outstanding obligation, the Petitioners individually, as signatories on the mortgage, and therefore guarantors of the obligation, would have been personally liable for the remainder owed on the note.

In its Brief, Respondent cites this Court's holding in *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715 (1990), to the effect that:

> Ordinarily, of course, a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.

U.S. Dept. of Labor v. Triplett, 494 U.S. at 720 (internal quotations omitted).

The Petitioners agree that such is the law. They respond, however, that they are asserting their own legal rights and interests, rather than those of third parties. As the treatise Corpus Juris Secundum sets out the rule:

> [I]t is almost universally recognized that every party to the record who has any interest that would be directly affected by a determination in an appellate review mus be made a party to the review proceedings . . . Thus it is a general rule of appellate practice and procedure that all persons who were parties to the action in the court below and who will be affected by, or who are interested in, the judgment, order, or decree, that is, all parties who will be affected by a reversal or modification of the

> judgment or decree . . . must be made parties to the appellate proceedings.

4 C.J.S. *Appeal and Error* § 232 at nn. 91-93, 95 (1993).

Moreover, the United States Court of Appeals for the Ninth Circuit has held that a party secondarily liable may appeal, even though the party primarily liable has chosen not to appeal. *U.S. ex rel. Celonese Coatings Co. v. Gullard*, 504 F.2d 466, 469 (9th Cir. 1974).

The Respondent's argument that the Petitioners lack standing, therefore, fails; and the Court must so hold.

II. THE RESPONDENT IS ESTOPPED TO ASSERT THE PETITIONERS' SUPPOSED LACK OF STANDING, AND HAS NOT PRESERVED THE ISSUE FOR APPEAL.

The foregoing argument is absolutely dispositive of the Respondent's claim that the Petitioners lack standing; and it proves that this assertion lacks merit and should be disregarded. However, even assuming *arguendo* that the Respondent's claim on this point had merit (and it does not), the Respondent still could not prevail, because it is estopped to assert the Petitioners' (supposed) lack of standing.

The equitable doctrine of estoppel by record is too well established to require either argument or the citation of extensive authority. It holds that a party may not deny the truth of that which he has previously asserted in the same action.

The basis of the Respondent's standing argument is that the Petitioners lack a justiciable interest in the instant action because they did not own the property at the time of the (purported) sale. As noted above, it was the Respondent itself which chose to implead the Petitioners as parties Defendant herein. By so impleading them, the Respondent asserted its belief that they did, in fact, have some justiciable interest in the instant proceeding. Having so asserted, the Respondent may not now be heard to argue that the Petitioners were and are not proper parties, or that they have no interest in the subject matter of this appeal.

The Respondent has also asserted that:

> The underlying judgment from which the Petitioners seek review was entered against Spring Air Park, Inc., and not the Petitioners.

Brief of Respondent at 4.

As the Court is undoubtedly aware, Kentucky courts do not recognize interlocutory appeals in civil actions, absent a certification of appealibility. CR 54. A judgment, in order to be "final and appealable," must resolve all of the issues as to all of the parties. Since the Respondent did not assert that the appeal which Petitioners filed in the Kentucky Court of Appeals was premature, they necessarily conceded that it had, in fact, resolved all of the issues as to all of the parties. Having failed to raise this question in either of the appellate courts below, the Respondent may not now, when it suits its purpose, assert for the first time that the judgment rendered by Clinton Circuit Court was not binding upon the Petitioners.

It hardly seems necessary to add that, since the Respondent did not raise this point in the courts below, it has not been properly preserved for appeal. *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

III. THE ISSUES PRESENTED FALL WITHIN THE COURT'S JURISDICTION TO REVIEW JUDGMENTS OF DECREES FROM THE KENTUCKY SUPREME COURT UNDER 28 U.S.C. § 1257.

In its Brief, the Respondent states that this appeal involves:

> [T]he proper application of two points of well-established Kentucky civil procedure - the reestablishment of a lost record of pleadings in the trial court, and the application of Kentucky's thirty-day deadline for instituting an appeal.

Brief of Respondent at 6.

The Respondent insists, however, that neither the reestablishment of a lost record nor a state statute of limitations, implicates the Due Process Clause of the Fourteenth Amendment. Respectfully, Petitioners insist that the Respondent is mistaken.

This Court has considered the question of whether lost state court records had been properly reestablished, on a number of occasions. The attention of the Court and counsel is respectfully directed to the holding of *Weatherhead's Lessee v. Baskerville*, 52 U.S. 329 (1850), in which this Court wrote:

> The point still to be noticed is so much of the instruction given to the jury, informing them that they might presume from the evidence that there had been a legal partition of the testator's land in respect to his daughters by order of a court when the executor assigned them certain parts of it. By the law of Tennessee such a partition is a judicial act and becomes a record. It can only be proved as such records may be, and, when it is alleged to have been lost or destroyed, its contents can only be reached by proofs of a certain and fixed kind, well known in the law. In the proper sense of the term "presumed<" the records of courts are never so. The existence of an ancient record of another kind maqy sometimes be established by presumptive evidence. But that is not done without very probable proof that it once exis'ed, and until its loss is satisfactorily accounted for. The rule in respect to judicial records is that, before inferior evidence can be received of their contents, their existence and loss must be clearly accounted for. It must be shown that there was such a record, that it has been lost or destroyed, or is otherwise incapable of being produced, or that its mutilation from time or accident has made it illegible; in this last, though, not without the production of the original in the condition in which it may be. The inferior evidence to establish the existence of a judicial record must be something officially connected with it, such as the journals of the court, or some other entry, though short of the judgment or record, which shows that it has been judicially made. The burning of an office and of its records is no proof that a particular record had ever existed. It only lays the foundation for the inferior evidence. If that cannot be got, the result must be, and is, that there has been an allegation of the existence of a record, without proof. There is no

> way of bringing it to the knowledge of others. Nor can it be said to be known certainly by him who asserts it. In this case, without any such proof, the jury was told that they might infer, from the burning of the records of the county of Mero and the conduct of the parties interested in the testator's lands, that there had been a partition according to law. If the instruction is put exclusively upon the want of proof to justify it, it could not be maintanied. But it was contrary to the positive proof in the record.

Weatherhead's Lessee v. Baskerville, 52 U.S. at 651-52.

The United States Court of Appeals for the Fourth Circuit similarly held in *Pineland Club v. Robert*, 171 F. 341, 347-48 (4th Cir. 1909), and in *Brown v. Harkins*, 131 F. 63 (4th Cir. 1904). In the latter case, the Fourth Circuit cited this Court's holding in *Weatherhead's Lessee v. Baskervills*, quoted above, and then cited nine additional holdings of this Court in which, the Fourth Circuit stated, this Court had considered the reconstruction of lost state court records to implicate federal constitutional rights. *Brown v. Harkins*, 131 F. at 66-67.

It is clear, therefore, that contrary to the Respondent's assertion, failure to utilize adequate procedures when reconstructing lost state court records, implicates federal constitutional guarantees.

The proper application of state statutes of limitation also implicates federal constitutional guarantees. In fact, this Court has twice stated that it will consider the constitutionality of state statutes of limitations. *Michel v. Louisiana*, 350 U.S. 91 (1955); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1944). In the latter case, this Court stated clearly that if a state statute of limitations is applied in an arbitrary or inequitable manner, it violates the United States constitution. 325 U.S. at 315-16.

CONCLUSION

Based on the foregoing, the Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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